



DEC 2

IN THE

JOHN F. DAVIS

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 619

STEVE ASHTON,

*Petitioner,**against*

COMMONWEALTH OF KENTUCKY

*Respondent.*

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## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

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1965.

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**STATEMENT**

The Commonwealth of Kentucky contends that certiorari should be denied in the present case because there are no substantial questions presented. The Commonwealth specifically contends:

1. Petitioner's conviction in Kentucky of the common law crime of criminal libel was not a violation of due process or the constitutional guarantee of freedom of the press since the basic elements of the crime have been sufficiently defined and there was no uncertainty as to the nature of the prohibited conduct.
2. Petitioner was not denied due process nor was his constitutional right of communication infringed by the instructions given by the trial court, since such instructions sufficiently defined the crime in accordance with recent decisions of this Court.

3. There was sufficient evidence introduced to show actual malice in the making of the false statements in that the style and tone of the writing and the circumstances surrounding its publication established that it was made with a reckless disregard of the truth.

4. There was sufficient proof that petitioner published the libel.

5. The statements made about the co-owner and co-publisher of the newspaper were false in part and constituted a libel.

6. Petitioner's constitutional rights were not violated merely because the conviction was for making malicious, false and derogatory statements about the official conduct of public officials.

## ARGUMENT

### I.

**The common law crime of criminal libel is not unconstitutionally vague as to its essential elements. Conviction of petitioner of the common law crime was not a violation of due process or the constitutional guarantee of freedom of the press.**

Admittedly, if a penal law is so vague that it fails to give fair warning of the conduct that will be held criminal, it violates the requirements of Due Process and in the case of publications constitutes a denial of freedom of expression guaranteed by the First and Fourteenth Amendments to the Constitution. *Winters v. New York*, 333 U. S. 507. The Kentucky Court of Appeals assumed for the purpose of its decision that the same certainty required of a criminal statute applies to a common law crime.

The state appellate court pointed out that the crime of criminal libel is recognized and enforced today throughout the

United States, and the courts of those states which have not legislated on the subject have acknowledged the existence of the crime in its common law form. *Beauharnais v. Illinois*, 343 U. S. 250, 265. The existence of the common law crime and the validity of punishment thereunder for certain publications was noted by Mr. Chief Justice Hughes in *Near v. Minnesota*, 283 U. S. 697 at 715:

"... But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the *common law rules* that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. The law of criminal libel rests upon that secure foundation." (Emphasis added.)

In the six Kentucky cases dealing with the common law crime of criminal libel, *Tracy v. Commonwealth*, 87 Ky. 578, 9 S.W. 822 (1888); *Smith v. Commonwealth*, 98 Ky. 437, 17 K.L.R. 1010, 33 S.W. 419 (1895); *Browning v. Commonwealth*, 116 Ky. 282, 76 S.W. 19 (1903); *Commonwealth v. Duncan*, 127 Ky. 47, 104 S.W. 997 (1907); *Yancey v. Commonwealth*, 135 Ky. 207, 122 S.W. 123 (1909), and *Cole v. Commonwealth*, 222 Ky. 350, 300 S.W. 907 (1927), the crime was in essence defined as consisting of four basic elements: (1) written words which are defamatory per se, (2) publication, (3) falsity, and (4) malice. As the Court of Appeals stated in its opinion:

"As we have heretofore indicated, the common law crime of criminal libel recognized in Kentucky is basically the publication of a defamatory statement about another which is false, with malice. There is no uncertainty in the law about what constitutes (1) publication, (2) defamatory words, or (3) falsity. There is a certain indefiniteness concerning the nature of malice but we find this difficulty with that term throughout the criminal law . . . We may point out that defendant does not contend the element of 'malice' is so vague, or uncer-

tain, or inclusive as to make unconstitutional his prosecution or conviction for criminal libel."

The four basic elements necessary to constitute the common law crime of criminal libel were emphasized in all the Kentucky cases heretofore decided. It cannot be said that petitioner's conviction of the common law crime is unconstitutional because the crime was so vaguely defined that persons charged with a violation could have had no reasonable notice of what acts were punishable and no comprehension of the nature of the conduct condemned before imposition of punishment.

## II.

The instructions of the trial court correctly defined the crime in accordance with the decisions of this court.

The trial court properly required the jury to find that the Commonwealth had established the four basic elements of the offense, namely, publication, defamatory material, falsity and malice. As stated in the opinion of the Court of Appeals:

"By instructions to the jury the trial court made a most commendable effort to identify the crime more fully than was done in the indictment. To convict, the jury was required to find the defendant 'did unlawfully publish \* \* \* certain libelous and defamatory matter' which was 'false and libelous, and was so *known to be false and libelous* when published by the defendant, and was written and published by him *solely and for the purpose of bringing* (the complaining witnesses) into great contempt, scandal, infamy and disgrace, and for the purpose of injuring, scandalizing and vilifying the name and reputation (of the complaining witnesses) \* \* \*'" (Emphasis added.)

The Court of Appeals went on to say:

"... Actually the instructions were more favorable to the defendant than the law required. The jury was

required to find the defamatory matter was 'known to be false', even though a reckless disregard of the truth would have carried the same imputation of wrongful conduct. The jury was also required to find that the defamatory matter was published '*solely* and for the purpose of' bringing the complaining witnesses into public degradation . . . While we disapprove of the use of the word '*solely*' in the instruction, its inclusion favored the defendant."

Petitioner contends that the offense of criminal libel as defined by the trial court in its instructions infringed his constitutional rights because it defined the crime in terms of its tendency to cause a "breach of the peace" or lead to an indictable act, which is too indefinite to identify criminal conduct.

As the opinion of the lower court points out, in the development of the common law of criminal libel in the United States, the offense is no longer founded, as it once was in England, upon the tendency of the defamatory words to cause a "breach of the peace" or to induce others to commit a public offense. The reference in the court's instructions to the tendency of the material to cause a breach of the peace is obsolete and unessential language which refers only to the *nature of the writing* which would constitute the basis for criminal libel. None of the previous Kentucky cases dealing with the crime based the criminality of the act upon the tendency to cause a "breach of the peace." As stated by the Court of Appeals:

"None of our Kentucky cases based the criminality of the act upon the tendency to cause a 'breach of the peace' or the commission of an 'indictable offense'. To the extent they defined the defamatory nature of the words in these terms, they are obsolete. In our latest case on the subject, *Cole v. Commonwealth*, 22 Ky. 350, 300 S.W. 907 (1927), which perhaps came closer to defining the crime than any of our other opinions, no mention is made of the possibility of public disturbance which might be incited by the publication.

"We conclude, therefore, that defendant cannot fairly claim that an outmoded aspect of the impact of the defamatory words made uncertain the kind of conduct for which he was prosecuted and convicted."

It is submitted that the possible uncertainty of the outmoded and superfluous concepts of "breach of the peace" or "indictable offense", as descriptive of the nature of the defamatory matter, does not unstabilize the essential elements of the offense with which defendant was charged, and the trial court in its instructions correctly set out all of the four basic elements.

### III.

There was sufficient evidence to authorize a conclusion by the jury that the statements about the chief of police and the sheriff were published with actual malice. The conviction of petitioner does not violate his constitutional guarantees merely because the publication related to the official conduct of persons holding public office.

It is sufficient to convict a person of criminal libel to show that the publication was made with actual malice in that the false statement was made with "reckless disregard of the truth." *Garrison v. Louisiana*, 379 U. S. 64. The *Garrison* case as well as *New York Times Co. v. Sullivan*, 376 U. S. 254 does not require any independent proof of actual malice. To do so would require the impossible, as stated in the opinion of the Court of Appeals:

"... Obviously, unless the defendant had told someone of an evil motive or had voluntarily taken the stand and so testified, actual malice could be proved only as a state of mind made manifest by the nature of the defamatory words and the circumstances surrounding their publication. *New York Times* and *Garrison* do require the establishment of actual malice (i.e., a calculated

falsehood), by proof rather than presumption, but they lay down no constitutional standards with respect to the *sufficiency* of proof (although New York Times considered the question of sufficiency).

"As we have intimated, if the defendant has not stated his motives to another person or has not taken the stand as a witness (as here), it is a practical impossibility to prove his knowledge, or reckless disregard of the truth, or his intent, or his purpose (all of which are subjective) except as a permissible inference which may reasonably be drawn from his particular conduct. Malice may be proved by circumstantial evidence as any other fact. *Combs v. Commonwealth, Ky., 356 S.W. 2d 761.*"

In the present case "Notes on a Mountain Strike" was clearly not any attempt at fair criticism of the conduct of the officials but was an attack upon them for the purpose of vilifying them and causing members of the public previously disposed to be neutral to choose sides and take the side of the strikers against the operators and the police for what was ominously referred to as the coming "show-down." Petitioner did not know the sheriff or police chief or newspaper publisher and made no effort to talk to them or ask their comments regarding the malicious rumors being spread about them by the strikers which he planned to strengthen by publication. Petitioner made no attempt to verify the truth of these stories even though on their face they cautioned inquiry. Although not himself acquainted with the region or its inhabitants or the specific targets of his abuse, petitioner did not hesitate to publish the worst allegations that he heard about the local law enforcement officials.

The plain fact is that petitioner published his pamphlet with a "reckless disregard of the truth" and did not care whether the statements contained therein were true or false. The style and tone of the pamphlet and the circumstances surrounding its publication clearly evidenced that petitioner was only interested in maligning the peace officers in order to sway the public toward

support of the striking miners among whom petitioner was living and with whom he associated.

The circumstances were sufficient to warrant the jury in concluding that the statements about the chief of police and the sheriff were published with actual malice.

#### IV.

**There was sufficient proof of publication of the libelous matter by petitioner.**

"Notes on a Mountain Strike" was a mimeographed publication bearing the date of March 22, 1963 with petitioner's name and address printed in ink on the back. City Policeman C. W. Begley testified that on the night of March 26, 1963 he and another officer were making a routine inspection of beer taverns when they entered Stacy's Tavern and saw petitioner and four or five others grouped around a table which had some pamphlets on it. Sergeant Cook who was with Begley saw the pamphlets and asked petitioner what they were with the reply being "reading material." Petitioner then asked Begley if he wanted one and when he said yes petitioner got a copy out from under the table and handed it to the officer and told him to take it home and read it. (E. 151, 152). Begley stated that petitioner "was free to give them to us. Wanted us to take one and read it." (E. 152, Q. 12).

The officers returned to the police station after their evening inspection of taverns and when Chief Luttrell came on duty the following morning he was shown a copy of the pamphlet which induced him to send Patrolman Anderson Asher to Stacy's Tavern to see if additional copies could be obtained. Officer Asher stated that when he went into the tavern on the morning of March 27 petitioner was present and upon inquiry reached under the table and got a copy of the pamphlet and gave it to him. (E. 160). Asher stated that the pamphlet was given to

him voluntarily by petitioner when he asked "Do you care if I have one?" (E. 162, Q. 10).

The evidence is sufficient to establish that petitioner was sitting at a table in a public tavern stapling together copies of "Notes on a Mountain Strike" and distributing prepared copies to anyone who came into the tavern and expressed curiosity as to what the pamphlets might be about. The evidence shows that petitioner voluntarily gave copies of the pamphlet to the officers and urged them to take them home and read them. There can be no question about there being sufficient evidence of publication.

#### V.

**The statements about Mrs. Nolan were false in part.**

"Notes on a Mountain Strike" published by petitioner falsely alleged that Mrs. W. P. Nolan, co-owner and publisher of the Hazard Herald, and her newspaper had received as a result of a nationwide television show over \$14,000 cash, as well as food and clothing which "was supposed to be sent to the pickets", but that Mrs. Nolan because of her opposition to labor saw to it that the pickets received only a small fraction of the money and food and gave the rest of it to the "scabs." As a matter of fact, the food and articles received by the newspaper were not earmarked to be used exclusively for the pickets or even the miners in general but were to be distributed to any and all "needy persons". (E. 122, Q. 14). Mrs. Nolan stated these items were not sent as a result of a TV show devoted exclusively to the plight of the striking miners, but came in as a result of another TV presentation. The contributions were divided between seven counties at the request of the Governor and distributions were made by committees on the basis of need. (E. 114, 116). Practically all of the money and material was duly distributed. (E. 120).

The moderating influence of the voice of the newspaper was sought to be diminished by attacking its publisher as a person who could not be trusted or relied upon since she had already violated a public trust by refusing because of prejudice against labor to give the striking miners the money and food which was contributed to the newspaper for their particular benefit. Petitioner did not attempt to ascertain the whole truth by inquiring into the facts of the matter and published the statements with a reckless disregard of whether they were entirely true or not.

## VI.

**A conviction and punishment for making false, derogatory and malicious statements about the official conduct of public officials does not violate the constitutional guarantee of freedom of the press.**

This Court held in *Garrison v. Louisiana*, 379 U. S. 64 that where false and derogatory statements were made about public officials with a "reckless disregard of the truth" a conviction for criminal libel would not be in violation of the constitutional guarantee of freedom of the press. This holding should not be set aside.

**CONCLUSION**

The questions presented in the petition are not substantial. The Kentucky Court of Appeals did not erroneously interpret the law and the trial court properly applied it. Certiorari should be denied.

Respectfully submitted,

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